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Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LOCAL 917, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

and **Case No. 29-CE-128**

PEERLESS IMPORTERS, INC.

Rachel Zweighaft, Esq., Counsel for the General Counsel
Allen B. Roberts, Esq. and Donald B. Krueger, Esq., Counsel for the Charging Party
Gene M. J. Szuflita, Esq., Counsel for the Union

DECISION

Raymond P. Green, Administrative Law Judge. This case was remanded to me and the hearing was held on January 11, 2006. [1]

The charge was filed by Peerless Importers Inc. on October 6, 2004 and the Complaint was issued on December 30, 2004. In substance, the Complaint alleged:

1. That Peerless, located at 16 Bridgewater Street, Brooklyn, New York is engaged in the distribution of alcoholic beverages.

2. That Diageo North America Inc., located at 450 Park Ave. South, New York, New York, is engaged in the wholesale distribution of alcoholic beverages.

3. That on or about May 17, 2004, Peerless and the Union entered into an agreement retroactive to November 11, 2002 that states:

> 3.27. Scope of Agreement. The handling of all railroad shipments, whether it be piggy back, tractor-trailer, flexi-van, or any other type of railroad conveyance, and those of freight consolidators and car loading companies, and freight brought via water or water borne, fish-back or birdy-back, originating elsewhere and terminating anywhere within Kings County, New York County, Bronx, Queens, Nassau and Suffolk Counties, bounded roughly by a line starting on the North Shore of Poet Jefferson and running southward through Coram in the middle and

[1] I initially dismissed the Complaint because the Charging Party refused to turn over certain documents, in unredacted form, that the Union had subpoenaed and which I determined were necessary to its defense. However, the Board disagreed with what it considered to be a drastic solution to an issue that could have been resolved by less drastic means. At the resumed hearing, I stated that my order requiring the production of the unredacted documents still stood. The Charging Party, instead of complying, turned over a redacted version of the documents to the Union.

on down to Patchogue on the South Shore, and in Staten Island and within a radius of fifty miles into the State of New Jersey, must be done by employees covered by this Agreement.

3.28. The unloading, loading and transportation of merchandise at freight depots, domestic and foreign, has been and continues to be unit work within the scope of this Agreement. All freight consigned to wine and whisky wholesalers, distributors, distillers, rectifiers or other processors or receivers of same, under contract to the Union, shall be handled and hauled from anywhere within the areas mentioned above to the Employer's receiving and shipping premises in accordance with the following stipulations and conditions, provided, however, if the Employer, at its option, assigns at least two employees as regular platform workers, the employer shall not be required to employee drivers and helpers for each outside vehicle.

3.29. Merchandise shipped from anywhere within the Continental United States or its Possessions, including Puerto Rico, whether by steamship, steamship container, or steamship van, piggyback, fishy-back, birdy-back, railroad car or van, shall come to rest somewhere with the areas mentioned above, there to be handled and transported to the wholesaler by employees covered by this Agreement.

3.30. The Employer shall transport all such merchandise arriving in above named conveyances with its own equipment and with a chauffeur and helper from the seniority list assigned to each truck. The chauffeur must remain with the load he or she has picked up until it is fully unloaded.

3.31. Merchandise in foreign commerce from other countries or commonwealths, arriving at ports in the United States or arriving at foreign ports and subsequently shipped here, whether loaded in vans, containers, tanks or other conveyances and all consignments of wines and liquors, or part thereof, when arriving or conveyed in barrels, casks, hogshead, pipes, tanks, or other type bulk liquor carrier, whether originating domestically or imported, shall be unloaded and/or transported wholly in the state of its arrival, by chauffeurs and helpers covered under the Agreement. Pier and piggyback may exceed six hundred cases.

4. That starting in or about April 2003, Diageo began making deliveries of alcoholic beverages directly to the Employer's Brooklyn facility. [2]

5. That in or about November 2003, the Respondent attempted to apply the provisions of the agreement to the deliveries made by Diageo by filing a grievance alleging that Peerless was violating the agreement by allowing Diageo to make deliveries of alcoholic beverages directly to the Brooklyn facility.

6. That on or about June 28, 2003, the Union took the aforesaid grievance to arbitration thereby entering into and reaffirming the agreement described above. This agreement, as applied, is alleged to violate Section 8(e) of the Act.

[2] At the opening of the hearing, the General Counsel amended this allegation to change the date from October 2003 to April 2003.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

Findings and Conclusions

I. Jurisdiction

The Complaint alleges, the Answer admits and I find that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act. The Answer also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Facts

Diageo, a company located in Stanford Connecticut is involved in the importation of alcoholic beverages to the United States. [3] It is a subsidiary of Diageo PLC, which is based in London. Among the well known brands that it sells are Smirnoff vodka, Bailey's Irish Cream, Johnny Walker and Tanqueray.

Peerless is a wholesale distributor of wines and spirits. It is located in Greenpoint Brooklyn and it distributes these products in the Metropolitan New York area. Its customers include retail wine and liquor stores, plus restaurants and hotels. It employs about 750 persons.

Peerless purchases wines and liquors from various suppliers including Diageo. In October 2002, it entered into an exclusive arrangement with Diageo to distribute the latter's products in the New York area. Previously, Peerless was one of two New York wholesalers who purchased Diageo's products.

For many years, the Union has represented the drivers and helpers employed by Peerless. Pursuant to the contract between the Union and Peerless, those employees have been assigned by Peerless to move freight not only from Peerless to its customers, but also from piers, railroad yards and storage facilities to Peerless' warehouse in Greenpoint. This has been a long standing practice, consistent with the express language of the contract provisions quoted above. Except in those circumstances where Peerless did not have sufficient drivers available and the Union therefore agreed to a particular waiver, the employees of Peerless have been exclusively assigned to bring goods from its suppliers' receiving locations to Peerless' warehouse. This was also the case when Peerless did business with Diageo before they entered into the exclusive agreement in 2002.

As noted above, Peerless and Diageo entered into a contract in October 2002 wherein Peerless was chosen, over a bid by another wholesaler, to be the exclusive wholesaler of Diageo's products in New York. This agreement is more than 40 pages long and appears, (at least to me), to be quite complex. Presumably it took some time and expertise to negotiate. It appears that pursuant to this agreement Diageo can, at least theoretically, unilaterally establish the prices of the beverages it sells to Peerless. On the other hand, if it deems the price for any particular product to be too high, Peerless can reduce or eliminate its purchases of those particular beverages. For example, if Diageo set the price of Sterling Sauvignon Blanc at a level that Peerless thinks will not sell well in New York, it could opt to not buy that brand and buy another brand of similar wine from another supplier. One can assume, given a market economy

[3] It also purchases wines from both domestic and foreign producers.

free from governmental price controls, that the power of Peerless to substitute another supplier for a competing product must impose some limitation on Diageo's theoretical power to set prices. [4]

The negotiation of this agreement was described in very general terms by Antonio Magliocco, Peerless' President. Significantly, he testified that during the negotiations there was no discussion about who was to be responsible for delivering the products from Diageo's receiving locations to Peerless' warehouse. Presumably as Peerless and Diageo had done quite a lot of business with each in the past, they were or should have been aware of the existing practice that Peerless and its employee-drivers would be the people who would be delivering the goods from the pier or rail yard to Peerless' warehouse. It would be hard to imagine that these astute business people did not factor into the contract price, the cost of delivering the products from Diageo to Peerless.

After the Peerless/Diageo contract was executed, the bargaining unit employees of Peerless continued their longstanding practice of delivering the products from Diageo to the Peerless warehouse. At that time, there is no question but that Peerless had the right to control the assignment of delivery driving work.

In or about March 2003, Diageo announced a program called "Delivered Pricing." It is claimed that under this program, someone in Diageo made the decision to have goods moved from its receiving point to Peerless' warehouse by Diageo's drivers rather than the bargaining unit drivers employed by Peerless.

However, neither the General Counsel nor the Charging Party produced any witnesses to describe which individuals made this decision. Nor were there any witnesses produced, (either from Diageo or Peerless), to tell me why this decision was made, when the decision was made or what the economic ramifications to the parties were. I do not know who participated in the making of the decision and I do not know who, if anyone, participated in any negotiations or discussions between Diageo and Peerless before the decision was made and implemented.

In any event, the Union, not having been notified of this change, and discovering that the driving work, traditionally performed by Peerless bargaining unit employees was now being done by others, it filed a grievance under the cited sections of its collective bargaining agreement.

On June 28, 2004, a hearing was held before arbitrator Richard Adelman. During that hearing, Peerless contended that the decision to have the deliveries made by Diageo's drivers was not within Peerless' control and/or that the provisions that the Union were seeking to enforce were violative of Section 8(e) of the National Labor Relations Act. Mr. Adelman issued an award in favor of the Union on September 28, 2004. As to the 8(e) argument, the arbitrator noted that the Company had not filed an 8(e) charge with the NLRB and that although he would have no hesitancy in ruling on that question if the Board had deferred its own proceedings to arbitration that was not the case here. He also stated:

[4] When setting prices, Diageo is required by New York State to post, on a monthly basis, the price of each of the items sold. (As a wholesaler, Peerless is also required to post its prices). This is not a matter of the State regulating the price of these goods, but rather to afford the public some transparency and to assure that no unfair discounts are given to some customers over others.

> Moreover, assuming that the Company's reading of the law regarding the meaning of the "right of control" test is correct, the Company, by not submitting its agreement with Diageo into evidence, failed to establish that Diageo had control over the work at issue. In addition, as stated above, the Company was aware of the terms of the agreement with the Union at the time it contracted with Diageo, yet the Company did not notify the Union of the arrangement it was making with Diageo. In short, although the Arbitrator finds that the Company violated the Agreement, it is not clear whether or not the Company had the requisite control over the work, or whether or not other factors should be considered in determining if Section 8(e) has been violated, decisions that should be made by the NLRB.

III. Analysis

The General Counsel asserted that she is not claiming that the clauses, taken separately or together, violated Section 8(e) of the Act on their face. That is, she concedes that the clauses could be interpreted, in the appropriate circumstances, as having a valid work preservation object. Her contention is that in the present circumstances, the Union asked the arbitrator to enforce the clause in an unlawful way because the work claimed, (certain truck driving), was work "not within the control" of Peerless and therefore was not work that could be "preserved."

In typical cases involving Section 8(e), the gravaman of the Complaint is that a union and a company employing individuals represented by the Union, have entered into an agreement whereby the Company has agreed not to do business with any other person with whom the Union has a primary dispute. In those circumstances, if such an agreement, either on its face *or* in its specific application, is used to prevent an employer or person with whom the Union has no primary dispute to cease doing business with another employer with whom the union does have a primary dispute, then the agreement is deemed to have a secondary objective and constitutes a violation of Section 8(e) of the Act. In such circumstances, the employer having the collective bargaining agreement with the Union is described as being an "unoffending neutral."

As the agreement between the Union and Peerless was made more than six months prior to the filing of the charge, the General Counsel must show that it was reaffirmed, (otherwise defined as re-entered), within the 10(b) statute of limitations period. Board cases have held that the General Counsel can meet this test by showing that the signatory union has filed a grievance and taken a case to arbitration to enforce the contractual provisions, not for a work preservation objective, but to compel the contracting employer to cease doing business with another employer or person. *Elevator Constructors (Long Elevator*), 289 NLRB 1095, (1988). [5]

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[5] I should note here that the Board in this case also held that an 8(e) finding based on the filing for arbitration would not be inconsistent with the holding of *Bill Johnson's Restaurant*. The Board stated:

> Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737, fn 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight*), 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

Faced with an 8(e) claim, a union often will argue that the attacked clause does not have a secondary objective and that it merely is designed to preserve the work of the bargaining unit employees covered by the collective bargaining agreement within which the alleged offending clauses reside. In this case, the Union contends that it has a contract with Peerless that covers the wages, hours and working conditions of truck drivers who are employed by Peerless. It contends, and that facts clearly show that for many years, Peerless truck drivers have uniformly had the assignment of picking up beverages from Diageo's receiving locations and delivering them to Peerless' warehouse in Greenpoint Brooklyn. The only exception to this practice has been when all of the Peerless drivers are otherwise busy and Peerless has no drivers available on any particular day to do the work. Therefore, the Union asserts that **(a)** this type of delivery work is clearly traditional bargaining unit work; **(b)** that the Union is merely seeking to preserve that work for the employees it represents; and **(c)** that it therefore has a "primary" dispute with Peerless and not with Diageo. In seeking to enforce its contract with Peerless, the Union contends that it merely is trying to enforce the bargain it made with Peerless to preserve bargaining unit work.

The General Counsel and the Charging Party respond by arguing that although the clauses in question may very well have a preservation of work objective, its enforcement *in this particular case* had a secondary objective because in this case Diageo made the decision to have the deliveries reassigned from Peerless' drivers to its own drivers. They therefore argue that when this happened in 2003, Peerless no longer had the "right to control" regarding the assignment of this work. Arguing that Peerless, having lost the right of control, they contend that the enforcement of the clauses cannot have a primary work preservation objective because Peerless no longer had the work to be preserved. That is, even if Peerless wanted to, it could not assign the work to its own drivers. The leading case dealing with the distinction between lawful work preservation clauses versus unlawful secondary hot cargo clauses is *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967). See also, *International Union of Elevator Contractors, Local 91 (Otis Elevator Company)*, 345 NLRB No. 68, (2005).

Since the clauses in question are legal on their face and concededly can have the primary objective of preserving bargaining unit work, the Union's attempt to enforce them by arbitration must be deemed legal unless the General Counsel and the Charging Party meet their burden of proof that Peerless did not have the "right of control."

In my opinion, the General Counsel and the Charging Party have failed to meet that burden.

Neither the General Counsel nor the Charging Party produced any witnesses to establish when, how or who made the decision to shift the work of delivering the goods from the employees of Peerless to the employees of Diageo. Essentially, they would have me accept a conclusory assertion, without any supporting witnesses, that Diageo made this decision and did so for some unknown reason. I simply do not know how or why this decision was made or by whom.

On the face of it, and absent any other explanation, the economic beneficiary of the change was Peerless and not Diageo. Obviously, if Diageo assumed the cost of delivering the products to the Peerless warehouse, then Peerless would reduce its costs without having to change a word or term of its contract with Diageo. For all I know, this decision was made after Peerless complained that its costs were too high and instead of changing the contract terms with Diageo, the latter offered to lighten Peerless' load by assuming the labor cost of having the goods delivered to Peerless' warehouse. If that was the case, (and there is no evidence to show that it was not), then Peerless would have been the real beneficiary of this change and

could not be considered an "unoffending neutral." *Painters District Council No. 20 (Uni-Coat Spray Painting Inc.*), 185 NLRB 930 (1970).

It is my opinion that with respect to the "right of control" issue, where the evidence resides within the exclusive knowledge of Peerless and Diageo, the General Counsel has the burden of proof. As union representatives did not participate in, or witness any transactions between Peerless and Diageo, they could not have any knowledge of those facts. Since it is my opinion that the General Counsel has not met her burden of proof on this issue, I conclude that the Union legally enforced its contract to preserve bargaining unit work for the employees it represents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: [6]

ORDER

The Complaint is dismissed.

Dated, Washington, D.C., March 15, 2006.

Raymond P. Green
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.